United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

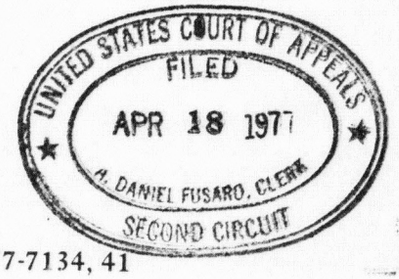
ORIG

To Be Argued By: Robert M. Beckman

77-7134, 41

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT



UNITED STATES TOUR OPERATORS ASSOCIATION, *et al.*
Plaintiffs-Appellees

— against —

TRANS WORLD AIRLINES, INC., *et al.*
Defendants-Appellants

Docket Nos. 77-7134, 41

B P/S

REPLY BRIEF FOR APPELLANTS, TRAVELLERS AIR SERVICES, INC., AND TRAVELLERS INTERNATIONAL TOUR OPERATORS, INC.

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April 18, 1977

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INTRODUCTION

USTOA claims an urgent need for a prompt court injunction of the TWA-TAS charter/tour program but

- USTOA has not sought a preliminary injunction.
- USTOA disclaims any change in its competitive situation either with or without the TWA/TAS program. 1/

USTOA argues that this is a run-of-the-mill attempted piecemeal appeal which raises no separate and important issue and denies no rights to defendants but

- USTOA devotes 19 pages of its brief to discussing the novel question of whether a private party can invoke the jurisdiction of the district court to litigate the meaning and effect of a requirement in a CAB regulation which has never been interpreted or applied by the CAB.
- USTOA recognizes that unless the motion to dismiss is granted the defendants are required to litigate the same issue contemporaneously before two tribunals.

USTOA claims that no administrative expertise or discretion is required to resolve the control issues but

- USTOA cites no CAB regulation or decision defining what degree of commercial interdependence constitutes control, for none exists.
- USTOA cites no CAB regulation or decision declaring that a corporation subject to economic control cannot nevertheless be "an independent principal" within the meaning of the ABC and ITC requirements, for none exists.
- USTOA prefers not to answer the defendants' observation that the CAB can waive any violation of its ABC and ITC regulations if the public interest so requires.

1/ USTOA Br., p. 27.

2/ USTOA Br., p. 34.

- USTOA discreetly ignores the interrelationship of the issues raised in its complaint with the economic, competitive, developmental and foreign affairs issues with which the CAB is currently grappling as part of the articulation of a consistent aviation policy in this newly created field of air transportation.

TAS believes that the bases for reversal of the district court orders set forth in TAS' original brief have not been answered by USTOA. This reply brief will not attempt to identify every erroneous contention in USTOA's brief, but will discuss the principal ones.

I

APPEALABILITY

USTOA offers two contentions to defeat appealability:

(1) USTOA asserts that defendants have no claim of right too important to be denied review. USTOA Br., p. 14. USTOA ignores defendants' right to trial in the proper forum. USTOA also ignores defendants' right not to be subjected "to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." Mercantile National Bank v. Langdeau, 371 U.S. 555, 558 (1963).

(2) USTOA cites Thill Securities Corp. v. New York Stock Exchange, 469 F.2d 14 (7th Cir. 1972), for the proposition that, under the Cohen rule, denial of a motion for referral to an administrative agency under the doctrine of primary jurisdiction is not an appealable order. Firstly, this Court has expressly refused to follow Thill Securities Corp. on the applicability of the Cohen rule. Herbst. v. International Telephone and

Telegraph Corp., 495 F.2d 1308, 1312 (2d Cir. 1974). Secondly, the Thill Securities Corp. case differs from the instant case in that the issue on appeal was not separable from the merits while, in the instant case, primary jurisdiction is entirely separable from the merits. As the court stated,

> Nor do we believe the issue is separable from the basic antitrust issues in the case, as was the procedural issue of the security required under state statute separable from Cohen's stockholder's derivative suit. 469 F.2d at 16.

In Thill Securities Corp., the Exchange sought to refer to the SEC the issue of the applicability of the antitrust laws to the antirebate rule. The SEC, however, (a) was not exercising actual and adequate review jurisdiction of the Exchange's commission structure, and (b) even if the SEC exercised jurisdiction, the Exhange did not thereby obtain antitrust immunity. In the instant case, the issue is the CAB's primary jurisdiction to determine a violation of the CAB's own regulations as to which the CAB is already exercising jurisdiction and has full power to prohibit the violation or waive the violation if the public interest so requires.

USTOA also appears to suggest that the issue in this appeal is not important. USTOA Br., p. 11. USTOA cites the statement in Moore's Federal Practice that "the Cohen rule would appear to require the presence of a question of general importance beyond the immediate concern of the particular litigants." However, Moore goes on to observe that Cohen has been applied by the Supreme Court and Courts of Appeal to orders which "decide nothing except the merits of particular cases." Federal

Practice ¶110.10 at 134 (2d ed. 1975). It is difficult, however, to follow USTOA's point because the question of the applicability of the primary jurisdiction doctrine to a claim by a private party that a CAB regulation is violated which the CAB is itself contemporaneously considering, is a novel issue and is obviously of general importance.

II

APPLICABILITY OF PRIMARY JURISDICTION

USTOA has a two-pronged defense against the applicability of the doctrine of primary jurisdiction: (1) USTOA argues that primary jurisdiction has "limited relevance" to a suit by a private party under section 1007(a) of the Act (USTOA Br., p. 16), but to the extent that it may be relevant, the CAB's amicus curiae suggestion that the CAB's investigation and the court litigation can both proceed "negates any rationale for invoking primary jurisdiction." (USTOA Br., p. 18). (2) USTOA argues that the issue is "simple" and does not require exercising expert discretion. Neither of these arguments is valid.

A. The Primary Jurisdiction Doctrine Applies to a Private Suit.

The Federal Aviation Act gives private parties in interest the right to sue to enjoin the performance of air transportation without a certificate of public convenience and necessity. Section 1007(a) of the Act. The availability of this procedure does not mean that the doctrine of primary jurisdiction is inapplicable. To the contrary, the limited nature of a private party's access to a judicial forum for violations of

the Federal Aviation Act requires careful examination of the scope of the district court's jurisdiction.

Under section 1007(a), the CAB may seek judicial relief for violation of "any provision" of the Federal Aviation Act, or "any rule, regulation, requirement or order thereunder". A private party, however, may apply to a district court only "in the case of violation of section 401(a) of this Act." In this case, USTOA is seeking judicial enforcement of a requirement in a regulation.

Section 401(a) requires a certificate to engage in air transportation. TWA has a certificate. TAS is exempted from the requirement of a certificate. Section 401(a) is not violated by either TWA or TAS. DHL Corporation, et al., v. Loomis Courier Service, Inc., 522 F.2d 982 9th Cir. 1975).

The gravamen of USTOA's complaint, as described by USTOA itself, is that TAS does not fulfill the requirement of the CAB's regulations that it be an "independent principal":

> In fact, however, the issue is simple -- is the Travellers group an "independent principal" as CAB regulations require (Complaint, ¶18; App. 18), or is it controlled by TWA (Id. ¶¶22-24; App. 12-13). 3/

USTOA asks the court to interpret section 1007(a) of the Federal Aviation Act as permitting a private party to sue for violation of a requirement in a regulation by the following tortuous argument: The CAB's ABC and ITC regulations state among the numerous "requirements" for an ABC or ITC charter,

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3/ USTOA Br., p. 25.

that the charter "shall be arranged and sold by a charter operator as an independent principal ..." Violation of the "requirement" means that the ABC charter is illegal which USTOA equates with non-elgibility for an exemption from the certificate requirements of section 401(a). USTOA then argues that since TAS does not qualify for an exemption, it is engaging in air transportation without a certificate in violation of section 401(a). USTOA contends that TWA is also engaging in air transportation without a certificate because it is violating an implicit term of its certificate which requires compliance with all the CAB's regulations. USTOA Br., p. 7.

USTOA's argument must be rejected. Firstly, extending federal court jurisdiction to a suit for violation of a requirement in a regulation nullifies section 1007(a)'s limitation of suits by private parties to violations of section 401(a). Congress clearly intended that only the CAB could apply to a district court for violation of a requirement in a regulation. If this Court accepts USTOA's tortuous elevation of the alleged violation of a requirement for an ABC or ITC charter into operation without a certificate, every violation of any CAB requirement, regulation or order can similarly be brought to court by a private party in interest.

USTOA's argument not only leads to an absurd result inconsistent with the plain words and meaning of section 1007(a), but it is intrinsically fallacious. An air carrier which holds a certificate is subject to an enormous web of regulatory requirements. The violation of any of these requirements is punishable, but does not mean that the air carrier is violating the certificate requirements of section 401(a). Indeed, the

proviso in section 401(g) of the Act, 49 U.S.C. §1371(g), makes clear that violation of a rule, regulation or other requirement cannot deprive a carrier of its certificate unless the holder of the certificate fails within a reasonable time to comply with a specific order of the CAB commanding obedience to the violated provision and the CAB acts to revoke the certificate after notice and hearing. Similarly, the holder of an exemption is protected by the Administrative Procedure Act from revocation of its license 4/ due to a violation. 5 U.S.C. §558(c) requires an agency to give written notice of the facts or conduct which may warrant revocation, and the licensee must be given "opportunity to demonstrate or achieve compliance with all lawful requirements."

Finally, the "independent principal" requirement is not a qualification for an exemption. The ABC and ITC regulations establish only one qualification for an exemption: being a "citizen of the United States." 14 C.F.R. §§371.2, 378.2(d). The violation of the "independent principal" requirement does not affect TAS' eligibility and qualification for its exemption.

4/ The exemption contained in the ABC and ITC regulations is clearly a "license" as defined in the Administrative Procedure Act. 5 U.S.C. §551(8):

> (8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter membership, statutory exemption or other form of permission.

B. The CAB Has Made No Finding of Illegality.

USTOA attempts to bring itself within this Court's Modern Air Transport [5/] and Aeromatic Travel Corp. [6/] cases. These cases have no applicability. In both of these cases, the CAB was the plaintiff. The CAB has not made a determination of violation in this case. To the contrary, it is actively investigating the issues raised by USTOA and, after five months, has only broadened and intensified its investigation. While the CAB's amicus brief in this Court mysteriously refers to a planned motion to intervene, the CAB continues to take "no position as to the merits of the allegations in [USTOA's] complaint." CAB Amicus Brief, p. 2, fn.

The intervention of the CAB's Bureau of Enforcement as amicus curiae cannot be equated with the Modern and Aeromatic cases. [7/] The CAB's Bureau of Enforcement has made clear that the Bureau had not determined illegality in the TWA-TAS relationship. Moreover, even if the Bureau of Enforcement had so concluded, it would merely be an accusation and not a determination of illegality by the CAB. Section 1002 of the Federal Aviation Act, 49 U.S.C. §1482, requires an adjudication by the CAB, after notice and hearing, that a person has failed to comply with the Act or the CAB's regulations.

5/ C.A.B. v. Modern Air Transport, Inc., 179 F.2d 622 (2d Cir. 1950).

6/ C.A.B. v. Aeromatic Travel Corp., 489 F.2d 251 (2d Cir. 1974).

7/ Nor is the appearance of the United States as amicus in Monarch Travel Services, Inc. v. Associated Cultural Clubs, Inc., 446 F. 2d 552 (9th Cir. 1972), relevant to this case. In Monarch Travel Services, the United States urged in its amicus brief that the defendant had violated section 401(a) of the Act. 466 F.2d at 553, n. 1. In the instant case, the CAB's amicus presentation does not conclude that USTOA's complaint establishes a violation.

The Bureau of Enforcement's representations are of little help in resolving the issue of primary jurisdiction. The Bureau of Enforcement merely offers its statement, without explanation or elaboration, that "the doctrine of primary jurisdiction is not applicable to issues raised in the complaint." CAB amicus brief, p. 2. This bare opinion of a staff component of the CAB, unsupported by reasons or persuasive argument, is entitled to little weight.

USTOA is incorrect in claiming that Mr. Bessel's affidavit means that "the Board has considered the matter and proclaimed that no reason exists for initial agency determination." USTOA Br., p. 19. Mr. Bessel can hardly be equated to the CAB and his unsupported assertion is hardly a proclamation that no reason exists for initial agency determination.

C. The Issues Are Not "Simple".

USTOA argues that "any control over Travellers would violate CAB regulations," and that the determination of "control" does not require specialized knowledge. USTOA Br., p. 26. USTOA is wrong on both points.

There is no CAB regulation prohibiting "control". The prohibition against control of a charter/tour operator by an air carrier is contained in section 408 of the Act, violation of which USTOA has no standing to raise in the district court. As explained above, the applicability of the control concept to USTOA's complaint lies in a tortuous interpretation of the "independent principal" requirement in the definition of an ABC or ITC charter. The CAB has made no such interpretation yet, and may not do so, although requests for such rulings are pending before the CAB. The CAB has already interpreted its regulations to permit the operation of ABC

and ITC charters by foreign charter/tour operators which are corporate subsidiaries of foreign air carriers. Certainly the district court should not attempt to develop an interpretation of the CAB's regulation. Congress intended the CAB to determine whether economic interdependence between a charter/tour operator and an air carrier is contrary to the public interest, not the district courts.

Nor is the determination of whether TWA controls TAS "simple" as USTOA contends. USTOA correctly points out that the only statutory guide is section 413 of the Federal Aviation Act, 49 U.S.C. §1383, which says that "control" means both direct and "indirect" control. USTOA Br., p. 25. This provision underscores the subtlety and complexity of a determination of "control". The CAB has never assayed a definition of control, leaving the determination to be made under the facts of each case in light of the policies and objectives of the Federal Aviation Act. E.g., Pan merican Airways, Inc., Aerovias de Guatemala, 4 C.A.B. 403, 404-05 (1943).

USTOA's own description of the steps through which it proposes to lead the court to a finding of "control" reveals the numerous judgmental factors requiring intimate and detailed knowledge of the charter/tour industry (USTOA Br., p. 6):

(1) USTOA first will request the court to find that TAS is "inextricably intertwined" with other tour operators which it calls the "Travellers Group." Whether these companies are intertwined and whether the intertwining is inextricable requires a thorough knowledge of the charter/tour industry which is not within the ordinary experience of the district court.

(2) USTOA will ask the court to find that "some" of the Travellers group had "long-standing relationships with TWA." The analysis of economic relationships and their meaning and effect is, again, a matter for the expert agency and not a district court.

(3) The next step in the proof is that TAS was "incapable of independently undertaking the heavy financial requirements" of the TWA/TAS 1977 program. Determination of TAS' capabilities to "independently" undertake the program requires expert knowledge and specialized judgment. The determination of whether the financial requirements of the program are "heavy" requires a knowledge of what such requirements are, how they are ordinarily financed, and whether TAS' requirements are unusually burdensome in relation to the rest of the industry. The district court cannot be expected to have the knowledge which the CAB and its expert staff have acquired through decades of experience.

(4) The district court would then be required to determine whether the economic relationships and interdependence between TWA and TAS means that TAS "could not possess the requisite independence" contemplated by the requirement that TAS be an "independent principal." The district court would first have to establish a standard of "requisite independence" since the required independence has not yet been articulated by the CAB in a regulation or decision. After making this determination, the district court would have to apply it to the complex factual issues. In this analysis, the district court would necessarily be making a policy judgment which will materially affect the development of ABC and ITC charters. Patently,

Congress intended the CAB to make these judgments. They are beyond the capability of the district court.

(5) Finally, the district court would be asked to determine whether it is in the public interest to enjoin any violation it may find. Congress intended the CAB to decide whether violations should be enjoined or waived depending on larger objectives of public interest in developing a new form of air transportation.

III

THE EFFECT OF THE CAB'S PENDING INVESTIGATION

USTOA asks the court to ignore the CAB's pending investigation of the TWA-TAS relationship. USTOA offers a barrage of arguments.

USTOA first attempts to create the impression that its informal complaint had no operative significance because it was not a "formal action" and informal complaints have "little stature, usually being disposed of 'by correspondence or conference.'" USTOA Br., p. 29. Without debating whether the Bureau of Enforcement is "free to let USTOA's 'informal' complaint remain in limbo forever" as USTOA contends,[8/] (USTOA Br., p. 30), the fact is that USTOA's informal complaint is not in limbo. The CAB is aggressively investigating USTOA's complaint as part of a broadening investigation.

USTOA relies on an unreported order in Alaska Int'l. Inc. v. Southern Air Transport, S.D. Fla., Case No. 76-2088-Civ-NCR, February 3, 1977, as a judicial rejection of TAS' contention that the district court should not consider a complaint being contemporaneously considered by the CAB (USTOA Br., p. 30). In that case, the CAB had completed its consideration and determined that there were violations of the Act.

USTOA characterizes TAS' suggestion that it is unsound judicial administration for the court to consider a part of a problem being actively investigated by the CAB as an attempt by defendants "to use

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8/ 5 U.S.C. §555(b) requires an agency to conclude matters presented to it "within a reasonable time."

the consequences of their illegal conduct as a shield to ward off civil litigation" and that defendants should not be allowed to "hide behind" the Bureau of Enforcement's investigation. USTOA Br., p. 32. Defendants have engaged in no illegal conduct and are hardly hiding behind the Bureau of Enforcement's investigation to which they must respond notwithstanding the pressures of this court litigation.[9/]

USTOA offers the amazing argument that "the Bureau of Enforcement's investigation is unlikely to produce any relief addressed to plaintiffs' complaint." USTOA Br., p. 32. USTOA's basis for its pessimism is that the Bureau of Enforcement's investigation is broader than the matters alleged by USTOA both in terms of parties being investigated and violations being considered. The enlargement of the investigation increases, not decreases, the likelihood of a resolution of USTOA's allegations. The fact that the Bureau of Enforcement is escalating its production demands, reaching out to additional parties and broadening the scope of the violations it is considering, hardly supports USTOA's dejected plaint that "the Bureau may drop its investigation or turn to other, more pressing matters." USTOA Br., p. 33.[10/] Of course, if

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9/ USTOA is incorrect in charging that the Travellers defendants "are simply failing or refusing to comply" with the CAB's investigations. USTOA Br., p. 35. The Bureau of Enforcement has been given thousands of documents as well as specially requested information, and TAS is actively developing additional information requested by the Bureau.

10/ USTOA also seems to believe that the CAB is preoccupied with regulating the airline industry and does not care about the charter/tour industry. USTOA Br., pp. 22-23. There is no basis for this charge.

there is no substance to USTOA's charges, as TAS believes to be the case, the Bureau should drop its investigation and produce no relief addressed to USTOA's complaint.

USTOA's contention that the Bureau's investigation does not cover violation of section 401(a) of the Act is incorrect. USTOA Br., p. 33. As set forth in the Bureau of Enforcement's letter to TAS' attorney dated March 1, 1977:[11/]

> This is to confirm our previous conversations in which I told you that the Bureau of Enforcement is investigating possible unlawful control relationships and other alleged violations of section 408, 409, 401, 402, 403, or 404 of the Federal Aviation Act of 1958 and of Parts 371 or 378 of the Board's Regulations or the existence of activities described in section 411 of the Act by Travellers Air Service, Inc. or by companies affiliated with it. (Underscoring added).

The CAB's Order C-208 dated March 25, 1977,[12/] is broadly drawn and cannot fairly be characterized as excluding consideration of violation of section 401(a). Of course, it may be that the CAB now believes that there are no violations of section 401(a) and this is why Order C-208 refers to control and interlocking relationships in violation of sections 408 and 409 of the Act and not specifically to section 401(a), but this is conjecture at this stage.

USTOA's final argument is that "agency action cannot provide effective relief in any event" because the CAB's action will be too slow to stop the TWA-TAS program before its completion. It is hard to

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11/ Attachment B to TAS Motion to Dismiss.

12/ Appended to TAS' original brief.

understand why the district court proceedings can be expected to be more expeditiously concluded. The CAB has the advantage of intimate familiarity with the charter tour industry and with its own regulations. The CAB has a five-month head start in gathering documentary and other evidence. As USTOA correctly observes, due process of law requires the CAB to give TAS a hearing before TAS can be deprived of its license to operate. USTOA Br., p. 34, n. 31. Can USTOA believe that constitutional due process does not also apply in the district court proceeding?

CONCLUSION

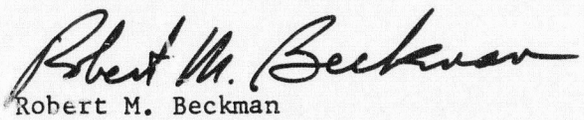
This case involves novel and difficult issues. Decision of the merits of the case will affect the CAB's development of a new form of low cost air transportation. The CAB is itself grappling not only with USTOA's complaint, but the broader policy questions of the appropriate relationships between air carriers and charter/tour operators.

USTOA declares that a prompt resolution of these issues is important to USTOA and therefore it needs access to a judicial forum which it perceives to be speedier than the CAB. However, USTOA has failed to explain why speedy termination of a program which has already been purchased by over 15,000 innocent passengers is important to USTOA. USTOA's brief points out that it will not be affected in any material way by the termination or operation of the TWA/TAS program. USTOA states that there "are 200 to 300 tour operators in business now." USTOA Br., p. 27. USTOA avers that elimination of the TWA/TAS program will have no noticeable effect:

> In fact, with or without the TWA/Travellers program, plaintiffs will continue to compete with scores of independent tour operators across the North Atlantic. Elimination of the TWA/Travellers program will not noticeably reduce competition. USTOA Br., p. 27, n. 27.

Thus, USTOA is essentially in the role of a private attorney general identifying an unlawful relationship and seeking a declaration that such conduct should be prohibited. There is no need for a private attorney general in federal court when the CAB itself is actively considering the whole problem.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES TOUR OPERATORS ASSOCIATION, ET AL.	:	
Plaintiffs-Appellees	:	
- against -	:	Docket Nos. 77-7134, 41
TRANS WORLD AIRLINES, INC., ET AL.	:	
Defendants-Appellants	:	

AFFIDAVIT OF SERVICE
BY MAIL

City of Washington
District of Columbia ss:

Robert M. Beckman being duly sworn, deposes and says that he is over the age of eighteen years. That on the 15th day of April, 1977, he served the with Reply Brief for Appellants, Travellers Air Services, Inc., and Travellers International Tour Operators, Inc. upon Harold L. Warner, Jr., attorney for defendant, Trans World Airlines, by depositing a true copy of the same securly enclosed in a post-paid wrapper in the Mail Chute

maintained and exclusively controlled by the United States at 1001 Connecticut Avenue, Washington, D.C., directed to said attorney, Harold L. Warner, for the defendant at 30 Rockefeller Plaza, 24th Floor, New York, New York 10020, that being the address within the State designated by him for that purpose upon the preceding papers in this action, of the place where he then kept an office between which places there then was and now is a regular communication by mail.

Robert M. Beckman

Robert M. Beckman

Subscribed and Sworn to before
me this 15 day of April, 1977

Carol J. Yahyavi
Notary Public

My Commission Expires December 31, 1979

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES TOUR OPERATORS ASSOCIATION, ET AL. Plaintiffs-Appellees - against - TRANS WORLD AIRLINES, INC., ET AL. Defendants-Appellants	:	Docket Nos. 77-7134, 41

AFFIDAVIT OF PERSONAL SERVICE

City of Washington
District of Columbia ss:

Robert M. Beckman being duly sworn, deposes and says that he is over the age of eighteen years. That on the 15th of April, 1977, at 2101 L Street, N.W., 10th Floor, Washington, D.C. 20037, he delivered the foregoing Reply Brief for Appellants, Travellers Air Services, Inc., and Travellers International Tour Operators, Inc. to Arthur J. Galligan, Attorney for the plaintiffs in this action, by delivering to and leaving personally with him a true

copy thereof. Deponent further says that he knew the person served as the aforesaid to be Arthur J. Galligan.

Robert M. Beckman

Subscribed and Sworn to before
me this 15th day of April, 1977

Notary Public

My Commission Expires December 31, 1979